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No. 328

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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LESTER C. NEWTON TRUCKING COMPANY,
*Appellant,*

v.

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
*Appellees.*

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**On Appeal from the United States District Court for the District of Delaware**

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## APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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Pursuant to Rule 16, Paragraph 8, of the Revised Rules of this Court, Appellant respectfully submits its Brief in opposition to the Motion to Affirm filed in behalf of the United States of America and the Interstate Commerce Commission.

### THE QUESTIONS INVOLVED ARE SUBSTANTIAL

This appeal presents fundamental questions concerning determination by the Interstate Commerce Commission

of a motor carrier's rights by virtue of preexisting authority, prior bona fide operations, and public need to continue to transport commodities fully made subject to economic regulation by the Transportation Act of 1958.

The cumulative effect of the Commission's determinations would curtail Appellant's future operations to a scope narrower than permitted by certificates of public convenience and necessity issued long before the 1958 Act, narrower than its prior bona fide operations, and narrower than required by the shippers and receivers of involved commodities who have long utilized Appellant's service.

The questions presented involve interpretation of the provisions of the Transportation Act of 1958 and provisions of the Interstate Commerce Act. The question of whether the 1958 Act narrowed the scope of Appellant's preexisting certificates is of import to all motor carriers holding certificates antedating that Act and has never been determined by this Court. The narrowed scope given Appellant's preexisting certificates was material to proper determination of Appellant's coextensive applications for "grandfather" authority under Section 7(c) of the 1958 Act and under the public convenience and necessity provisions of Section 207(a) of the Interstate Commerce Act. Thus, if the proper scope of Appellant's preexisting certificates is broader than found by the Commission and the lower court, these applications must be redetermined. The standards employed in determining these applications were otherwise inconsistent with proper standards adumbrated by this Court and by other courts.

A. The Commission found (J.S. App. 26-29, 63) and the lower court agreed on other grounds (J.S. App. 79-81) that some of Appellant's certificates antedating the 1958 Act but not those reading *"Agricultural commodities"* [1]

[1] Appellant's authority reading *"Farm produce,* except citrus fruits," was equated with and treated the same as Appellant's

now authorize the transportation of frozen fruits, vegetables and berries made subject to regulation by the 1958 Act. The Government concedes (G.M. p. 10, n. 7) that the Commission and the lower court differed in their rationale but argues that both reached the correct result and that the difference in rationale "is beside the point . . ." In fact, neither rationale is correct, the Commission's is based upon a finding of specific intent which is clearly erroneous, the lower court's emasculates an entire section of the 1958 Act.

As the Government contends (G.M. 8) the Commission's construction turned upon a finding of specific intent at the time of issuance of Appellant's *Agricultural commodities* certificates not to include frozen fruits, vegetables, and berries. However, this finding of intent is the sheerest tautology; the Commission's only intent at the time of issuance of Appellant's *Agricultural commodities* certificates was to include the same commodities embraced within the unmanufactured agricultural commodities exemption of Section 203(b)(6) of the Interstate Commerce Act. (J.S. 19-20).[3] Since the scope of

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*Agricultural commodities* certificates (J.S. App. 27-28, n. 11) and the former is comprehended within the latter terminology herein.

[3] Appellant's *Agricultural commodities* certificates were all initially issued in the late 1930's and early 1940's at a time when the Commission interpreted the unmanufactured agricultural commodities exemption to apply only to a vehicle which never at any time handled any nonexempt commodities (J.S. App. 74-75). Under the Commission's construction at that time it was necessary for a carrier to have a certificate covering the commodities otherwise embraced within the exemption as long as the carrier used the same vehicle for handling nonexempt commodities whether or not the exempt and nonexempt commodities were in a mixed load.

The Commission had no occasion to consider the status of any frozen fruits or vegetables under the exemption or any certificate theretofore issued prior to its split decision in 1944 in *Newton, Extension-Frozen Foods*, 43 M.C.C. 787. The Commission's majority held in the *Newton* case that frozen fruits and vegetables were not unmanufactured agricultural commodities and thus not

Appellant's *Agricultural commodities* certificates was equivalent to the unmanufactured agricultural commodities exemption, definitive interpretations of commodities included within the exemption applied equally to Appellant's *Agricultural commodities* certificates. Findings by this Court and others (J.S. 5) that frozen fruits, vegetables and berries were within the exemption applied with equal force to the scope of Appellant's certificates. Neither the Government [3] nor the lower court [4] doubted

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within the exemption or Appellant's *Agricultural commodities* certificates. The *Newton* case did not turn not upon any finding of specific intent relating to any frozen commodities at the time of initial issuance of Appellant's certificates. Quite the contrary, the Commission there recognized, at 788: "Fresh frozen fruits and vegetables, as described in this record, are of relatively recent appearance on the market." The majority's decision in the *Newton* case turned upon its view that these frozen fruits and vegetables were (at 789) "subjected to a process of manufacture . . ." and thus not within the unmanufactured agricultural commodities exemption. Since Appellant's *Agricultural commodities* certificates were equated with the scope of the exemption, the majority held that additional authority was required and granted Appellant limited frozen food authority. Needless to say, the frozen food authority held by Appellant is far less encompassing than its *Agricultural commodities* certificates or Appellant would not have cause to contest the restrictive construction of the latter.

[3] In its brief to the lower court the Government stated (at 20):

> "In keeping with the purpose for which such certificates were issued, the Commission followed the general policy of construing the commodity description 'agricultural commodities' to embrace the same commodities as were covered by the Section 203(b)(6) exemption. *E.g., Penn-Dixie Lines, Inc., Extension*, 78 M.C.C. 188 (1958). Because of the conflicting Commission decisions, court decisions, and statutory amendments, the scope of that exemption at times assumed an accordion-like character, expanding or contracting as far as various specific commodities were concerned. *The certificates, of course, expanded and contracted accordingly.*" (emphasis added).

[4] The majority of the lower court observed (J.S. App. 79):

> "We find some difficulty in accepting the Commission's interpretation that the scope of the 'agricultural commodities'

the reasonableness of this position. In sum, therefore, the Commission's finding of specific intent was clearly erroneous and may not be used as a means for narrowing Appellant's certificates. Cf. *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, at 558-59, n. 4.

Since Appellant's *Agricultural commodities* certificates included frozen fruits, vegetables and berries prior to, and without consideration of, the Transportation Act of 1958, it follows that these certificates must today include those same commodities unless their scope was narrowed by the 1958 Act.[5] Since Section 7(b) of the 1958 Act (J.S. 20-21) expressly saved preexisting certificates covering "property made subject to" regulation by Section 7(a) (including thereby frozen fruits, vegetables and berries),[6] it would seem beyond dispute that the 1958 Act expressly saved Appellant's *Agricultural commodities* certificates. However, the lower court (J.S. App. 79-81) and the Government (G.M. 10) disregard the plain meaning of the statute. Their conclusion that Appellant's *Agricultural commodities* certificates are not embraced within Section 7(b) is premised upon distinctions which are not apparent in the terms or legislative history of the 1958 Act and which require emasculation of Section 7(b). Cf. *United States* v. *Menshe*, 348 U.S. 528, at 538-39.

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class remains fixed as of the time of issuance of such a certificate."

However, the lower court found it unnecessary to resolve this issue (J.S. App. 79), "[a]ssuming *arguendo* that frozen fruits, berries and vegetables are included [within Appellant's *Agricultural commodities* certificates]. . . ."

[5] The Commission cannot narrow the scope of outstanding certificates without observing statutory standards and procedures not here involved. *Watson Bros. Transportation Co.* v. *United States*, 132 F. Supp. 905 (D.C. Neb. 1956), aff'd *per curiam*, 350 U.S. 927.

[6] *Milk Transport, Inc.* v. *United States*, 190 F. Supp. 350 (D.C. Minn., 1960), aff'd *per curiam*, 368 U.S. 5.

The lower court appears to base its conclusion upon two subsidiary findings (J.S. App. 79-81): (1) that Section 7 of the 1958 Act affected only property previously exempt; and (2) that only mixed loads were exempt prior to the 1958 Act. However, the lower court's conclusion does not follow from these subsidiary findings but only from their erroneous application. There is nothing in the terms of the 1958 Act or in its legislative history to suggest that Congress was distinguishing the status of types of *shipments* of the same commodity. If such a distinction in fact existed, then Section 7(b) could not have "saved" the right of any certificate respecting straight loads, since immediately prior to the 1958 Act no certificate, however framed, covered a straight load shipment of frozen fruits, vegetables or berries.[7] Moreover, if Section 7(b) only "saved" the shipments which were formerly covered by a certificate, then at least the right to handle mixed loads must have been saved despite the lower court's unexplained conclusion to the contrary respecting Appellant's *Agricultural commodities* certificates.[8]

B. The "transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of [the applicant] to perform the services"[9] are matters properly to be considered in determining a "grandfather" application under Section 7(c) of the Transportation Act of 1958. These factors

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[7] The basis for the lower court's finding (J.S. App. 80) that the Commission correctly found Appellant's "general commodities" and "frozen foods" certificates were saved by Section 7(b) because these certificates "authorize the transportation of 'property made subject to' the Interstate Commerce Act" is unclear to Appellant.

[8] As already noted (note 2, *supra*) Appellant's *Agricultural commodities* certificates were, in fact, issued to cover both straight and mixed loads of unmanufactured agricultural commodities.

[9] *Willis Shaw Frozen Express, Inc.* v. *United States*, 377 U.S. 159 D-160.

are also of obvious import to a proper determination of public convenience and necessity under Section 207(a) of the Interstate Commerce Act where the applicant is a carrier already in the field. Cf. *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236.

Here, Appellant's evidence included not only its existing authority and actual past operations but also the testimony of supporting processors who had long utilized *Appellant's* service. This supporting testimony attested to Appellant's past holding out and service throughout the territory involved, responsive to the shifting origins and destinations, the future continuing and expanding need for Appellant's service, and the adequacy of existing service only if Appellant's service was included. However, except for limited purposes the Commission put aside this evidence in determining the "grandfather" application [10] and denied the public convenience and necessity application because the evidence failed to show that existing service was inadequate.[11] The lower court, despite its exhaustive consideration of the evidence of the past shipments handled by Appellant, summarily dismissed this supporting evidence in considering the "grandfather" application (J.S. App. 85-86, 92 n. 19) and found support for the Commission's denial of the public convenience and necessity application in its findings that existing services were not shown to be inadequate (J.S. App. 96-99). The lower court stated (J.S. App. 96):

> A basic ingredient in the determination of public convenience and necessity is whether the existing facilities are adequate to meet the present or future transportation requirements.

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[10] The Commission considered this evidence only in determining whether to treat the commodities involved as a single class and in considering the base area granted. (J.S. App. 63-64, 66).

[11] (J.S. App. 66-68). By comparison, the Commission in an earlier Report granted substantial authority despite the absence of a showing of inadequacy. (J.S. App. 31-32).

By thus relegating the supporting testimony to public convenience and necessity issues and applying a severe adequacy of service standard, the Commission has entered findings, approved by the lower court, which would severly curtail Appellant's future operations and its ability to continue to be responsive to the transportation requirements of the involved shippers. The adequacy of service standard employed and approved by the lower court in determining public convenience and necessity issues is in conflict with decisions in other courts considering comparable circumstances. *Nashua Motor Express, Inc.* v. *United States*, 230 F. Supp. 646 (D.C. N.H., 1964); *Bowman Transportation, Inc.* v. *United States*, 211 F. Supp. 354 (D.C. Ala., 1962); *Dixie Ohio Express, Inc.* v. *United States*, 263 F. Supp. 993 (D.C. Ohio, 1966). Recent application of an adequacy of service standard to set aside a Commission grant of authority enabling new competitive service is otherwise being contested by the Government before this Court.[12]

[12] *United States et al.* v. *Dixie Highway Express, Inc. et al.* No. ——, October Term, 1967, on appeal from United States District Court for the Southern District of Mississippi, Eastern Division, *sub nom. Dixie Highway Express, Inc., et al.* v. *United States et al.*, 268 F. Supp. 329 (1967)—date for docketing appeal extended to October 8, 1967.

## CONCLUSION

It is respectfully requested that Appellees' Motion to Affirm be denied and that plenary consideration of the issues be afforded.

Respectfully submitted,

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